

~~March 5 April 1 April 9, 2004~~  
DRAFT—DRAFT—DRAFT  
PCIA PROPOSED EDITS 4/16/04  
**BEST PRACTICES**  
for  
**EXPEDITING THE PROCESS OF**  
**COMMUNICATIONS TOWER AND ANTENNA SITING REVIEW**  
**PURSUANT TO SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT**  
by  
**MEMBER TRIBES OF**  
**THE UNITED SOUTH AND EASTERN TRIBES, INC. and National Congress of American**  
**Indians<sup>1</sup>**  
and  
**LICENSEES AND APPLICANTS OF**  
**THE FEDERAL COMMUNICATIONS COMMISSION**

## I. Introduction.

The Federal Communications Commission (Commission) and the United South and Eastern Tribes, Inc., (USET) have agreed to this the principles, procedures, and practices outlined in this document (Best Practices) document to promote cooperation between USET member Tribes and certain entities subject to the jurisdiction of the Commission (Applicants).<sup>2</sup> ~~(Applicant)~~ The term Applicant for this Best Practices document means a Commission licensee, permittee, or registration holder, or an applicant or prospective applicant for a wireless or broadcast license, authorization or antenna structure registration, and the duly authorized agents, employees, and contractors of any such person or entity. The principles, procedures, and practices Voluntary Best Practices described in this document are meant to guide Applicants in the review under Section 106 of the National Historic Preservation Act (NHPA), 47 U.S.C. § 470f, of the impact of telecommunications facilities on sites of religious and cultural significance to USET Tribes that are listed in or eligible for listing in the National Register of Historic Places (National Register).

The Commission has certain trust responsibilities when dealing with federally-recognized American Indian tribes and Alaska Native villages that devolve from the unique government-to-government trust relationship it shares with tribes and the inherent sovereign status of tribes.<sup>3</sup> In accordance with the federal government's trust responsibility and as provided in the NHPA, the involvement of Commission Applicants in the Section 106 process does not nullify or substitute for the Commission's obligations to consult with

---

<sup>1</sup> *Since the National Congress of American Indians have participated in this process, why not include them as signatories? In addition to the 24 USET tribes, the NCAI membership includes other Federally-recognized and perhaps non-Federally recognized tribes. The more tribes who participate in the voluntary best practices agreement and use the TNS, the better.*

<sup>2</sup> See Memorandum of Understanding Between the Federal Communications Commission and the United South and Eastern Tribes, Inc., Regarding Recommended Best Practices and the Section 106 Process (February 3, 2004).

<sup>3</sup> See, Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes (16 FCC Rcd 4078 (2000)).

~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

federally recognized Indian tribes under Section 101(d)(6) of the NHPA, or abrogate the general trust relationship which the Commission has with tribes.

The Best Practices described in this document are recommendations. Failure to follow these Best Practices does not by itself establish lack of good faith or a failure to comply with Section 106 of the NHPA or the Commission's rules. Adherence to these Best Practices may, however, be used to demonstrate a good faith effort to comply with applicable requirements. In evaluating compliance with the Commission's rules, the Commission will examine the totality of the circumstances and the reasonableness of the methods employed. Use of, or reliance on, these Best Practices, in any way, by USET is conditioned on USET's full and complete participation in the Commission's Tower Construction Notification System, as the System may be modified, in any way, over time.

**Overarching Objectives.** Applicants are engaged in the construction of ~~a universal~~ wireless telecommunications infrastructure networks that ~~is are~~ vital to the economic and social future of the United States. The interest in the preservation of properties of Tribal religious and cultural significance is also vital, both to the Tribes, and to the United States in terms of its historic preservation goals and its identity as a nation of diverse and vibrant peoples and cultures. These Best Practices are intended to achieve a simple result - assuring that Applicants have certainty in a timely way regarding Tribal concerns as they construct ~~this these~~ networks and that tribes have the ability to participate in the assessment and mitigation of any effects ~~such towers new~~ communications infrastructure towers construction may have on Tribal properties of cultural and religious ~~importancesignificance~~. It is hoped that through this process the Tribes and Applicants can resolve most matters, thus limiting the necessity for government-to-government consultation on each site-proposed construction between the FCC and affected Tribes. To achieve this, Applicants ~~and Tribes~~ must commit to providing adequate data to each other and facilitating Tribal communications between each other ~~ability to respond to Industry requests~~. Similarly, ~~all partiesparticipating Tribes~~ must commit to meeting the strict deadlines set forth herein. All parties must approach these undertakings working in good faith, showing flexibility, and making every effort to build a trusting and responsive relationship.

The specific goals of these Best Practices are to:

- Facilitate the Commission's compliance with its obligations under the NHPA;
- Insure that Tribal interests in the preservation of properties of religious and cultural significance to the Tribes listed in or eligible for listing in the National Register are identified and taken account of early in the process of siting ~~tele~~communications facilities;
- Address the needs of the Applicant in a cost-effective and efficient manner and encourage the expeditious development of ~~a universal~~-wireless telecommunications infrastructure networks that ~~is are~~ vital to the economic and social future of the United States;

~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

- Expedite USET tribal review of proposed tower and antenna sitings; and
- Establish a process that will ~~provide~~ facilitate Commission Applicants' ~~with obtaining~~ access to the special expertise held by USET Tribes in the identification, evaluation, and assessment of impacts on properties of cultural or religious significance to Tribes that are listed in or eligible for listing in the National Register.

These Best Practices are intended to expedite, streamline and tailor the NHPA Section 106 process for communications facilities by establishing steps whereby Applicants and Tribes can work together in the identification and evaluation of properties of religious and cultural significance to tribes that are listed, or potentially eligible for listing, in the National Register in areas where towers are planned. Further, these Best Practices will promote FCC administrative efficiency by providing a mechanism for Tribes and Applicants to resolve issues regarding facilities construction and Tribal historic properties.

Individual Applicants and individual Tribes may find that there are alternative procedures to these Best Practices that better suit their circumstances or their particular relationship. During the initial contact, and as appropriate in subsequent contacts, the Applicant and the Tribe can agree to procedures other than those provided in this Best Practices document. To ensure accurate records, the parties should consider commemorating these procedures in writing. Any such alternative procedures should lead to determinations, in writing, similar to those provided for in these Best Practices regarding tribal interest or no interest in a site and how potential adverse effects would be addressed.

While the principles and procedures set forth in these Best Practices are intended to afford Applicants useful guidance in order to facilitate and expedite historic preservation and environmental reviews, as noted above, implementation of these Best Practices is not mandated in order to comply with Commission rules, and decisions as to whether to abide by any or all of these Best Practices are intended to be left with each Applicant and each Tribe so long as all parties comply with applicable law and regulations. ~~In evaluating compliance with the Commission's rules, the Commission will examine the totality of the circumstances and the reasonableness of the methods employed.~~

*At the April 13<sup>th</sup> meeting, Mr. Brown noted that some tribes have established individual MoA and/or MoU with federal agencies, local governments and Applicants, and they have been quite effective. Consistent with the goal to facilitate dialogue and establish mutually beneficial relationships between Applicants and tribes, CTIA recommends the BPA place greater emphasis on individual MoA and/or MoU between Applicants and tribes are desirable. The BPA should explicitly note that Applicants have the option to enter into separate MoA and MoU with other Federally-recognized Tribes or groups of tribes, and that such agreements supercede the voluntary BPA.*

## **II. Identifying Tribes, Tribal Areas and Tribal Officers.**

~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

**A. Identification.** Applicants are encouraged to use the Commission's Tower [Construction](#) Notification System to identify Tribes that may attach religious and cultural significance to historic properties in the geographic area in which proposed construction will be located. Applicants should make initial contact with all Tribes that assert such a potential interest. Applicants should also use the Tower [Construction](#) Notification System to identify the Tribal Official responsible for historic preservation, with whom all contacts should be made.<sup>4</sup> Tribes should facilitate Applicants' making effective initial contact by supplying the relevant information to the Tower [Construction](#) Notification System and updating it promptly upon any changes.

**B. Automated Notification Feature.** Applicants are encouraged to use the automated notification feature of the Tower [Construction](#) Notification System to provide early notice to interested Tribes of proposed construction. If the Tribe has so agreed, automated notice through the Tower [Construction](#) Notification System ~~may will~~ **shall** constitute the Initial Contact described in Section III.B.

**C. Input of Data by Tribes.** Tribes are encouraged to input into the Tower Notification System the **specific** geographic areas for which they would like to receive notice of a proposed tower facilities construction, the name and contact information for the Tribal Official responsible for and authorized to handle historic preservation issues, and the preferred method of initial contact (email, letter, or both).

### III. Contacting and Working with a Tribe.

**A. Contact between Applicants and Tribes is a two-step process.** Applicants following these best practices should contact the Tribe in a good faith, respectful, and culturally sensitive manner befitting the nature of correspondence with a sovereign government. The name, address, and telephone number of the Applicant's official responsible for compliance with these Best Practices should be included. A sample Request for Review cover letter is appended as Appendix A. If a contractor for an Applicant makes contact with the Tribe, the Applicant should supply the contractor with a copy of this Best Practices document before the contact is made and require the contractor to adhere to this process, unless alternative procedures, as described above, have been adopted by the Tribe and Applicant. The Applicant, as the entity seeking Tribal contact, retains the responsibility for complying with the Commission's rules and, therefore, should maintain control over all aspects of the process.

**B. Initial Contact.** Initial contact with a Tribe should be made ~~by at~~ the Applicant's as soon as possible -earliest planning stage, but in no event later than when the Applicant narrows its search to a specific site. Failure to contact the Tribe early in the siting process may impede the review process. The Applicant, relying on the contact information contained in

---

<sup>4</sup> In many instances, such official will not be the Tribal leader, but another official designated to represent the tribe on historic preservation matters. Letters sent to the incorrect official may result in delays in processing. Letters sent to individual tribal citizens not listed in the Tower [Construction](#) Notification System are not consistent with these Best Practices and are likely to cause confusion and result in delay.

~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

the Tower Notification System, should make an initial contact with the Tribal Official listed therein. This contact should be made through the Tower Notification System ~~(if a Tribe has so agreed)~~, or by telephone or e-mail, to facilitate an immediate reply. The purpose of this contact is to ascertain a Tribe's interest in the area under consideration for a siting project not otherwise excluded from this process. Additional purposes for this contact should also be to establish a relationship with the Tribe, and discuss expectations for future contacts in this process.

In his or her response the Tribal Official should advise the Applicant within ten (10) business days whether the Tribe has:

1. **No Interest.** If the Tribe determines that there is not a likelihood of eligible properties of interest to the Tribe in the area, it should advise the Applicant by letter or e-mail.<sup>5</sup> This letter or e-mail will serve as evidence that the tribe has issued its response and may be appended to any submission made to the State Historic Preservation Office (SHPO) or the Commission. If a Tribe indicates it has no interest in the area under consideration, the Commission's obligations under Section 106 of the NHPA are satisfied without further discussions with the tribe. The Applicant should recognize that a finding of "No Interest" does not preclude the possibility that inadvertent finds made during the construction process may be of interest to the Tribe. See, Section VI.
2. **Tribal Interest.** If the Tribe indicates that there are or may be properties eligible for or listed in the National Register and if it believes the telecommunications facility may adversely impact the properties, the ~~Applicant and~~ Tribal Official should provide substantial evidence discuss the basis for this belief, and the Applicant and Tribal Official should discuss general expectations of how Tribal interests will be protected. If the Applicant chooses to proceed with the project, these discussions may include project time tables and other conditions that may govern work in the area, as well as any agreed upon alternative procedures as provided for above in Section ~~III~~.I. To ensure that Tribes' interests are duly noted, the Tribal Official should memorialize these matters in writing.

**C. Tribal Failure to Respond To Initial Contact.** If the Tribe fails to respond within ten (10) business days to an Applicant's Initial Contact, the Applicant ~~should make a second attempt to contact the Tribe. If, following a second attempt at Initial Contact, an Applicant does not receive a response within ten (10) business days thereafter, the Applicant~~ should advise ~~the Tribe and~~ the Commission in writing, with a copy to the Tribe, of the failure to respond, documenting the dates on which the Initial Contact was made and the means used. Within ~~thirty (30) five (5) business~~ days Upon receipt of information that a Tribe has failed to respond to an Applicant's Initial Contact, the Commission will initiate, and, if possible, complete, government-to-government consultation under Section 106. Within

<sup>5</sup> A Tribe that has "No Interest" in an area is encouraged to alert the Applicant to any other Tribe that it believes may have an interest.

~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

~~thirty (30) days, absent extraordinary circumstances, the Commission will complete advise the Applicant either that the Tribal Consultation and will, within three (3) working days thereafter, will so advise the Applicant. is concluded or in progress. If the Commission does not provide such advice within thirty (30) days, the Applicant should contact the Commission.~~ The Commission will keep the Applicant informed regarding the process for consultation with the Tribe and will include the Applicant in discussions with the Tribe, to the extent appropriate in the context of the Commission's government-to-government relationship with and trust responsibility to federally-recognized Tribes. In the event that the Commission deems it necessary, after the failure of reasonable and good faith efforts to initiate consultation, to authorize the Applicant to complete its assessment of the site without Tribal input, the Commission will copy the Tribe on any such authorization.

**D. Written Request for Review.** If a Tribe has indicated during Initial Contact or pursuant to Commission contact that it has an interest in the project area in accordance with the provisions outlined in Section III.B.2 and the Applicant chooses to proceed with the project, an Applicant following these Best Practices should send a Request for Review Packet to the Tribal Official. The Request for Review Packet may be sent either by USPS First Class Mail, preferably certified and return receipt requested, or by overnight courier service.<sup>6</sup> Facsimile transmissions of information to the Tribe will not be sufficient due to the potential for degradation of graphic information that may be necessary for decision-making.

In addition to a Request for Review Letter, the Request for Review Packet materials provided to the Tribe should include the following information, as well as additional materials that may have been identified during Initial Contact. The timeframe for tribal review will not begin until all the materials listed below are received.

1. **Name, address, and telephone number** of the Applicant's official responsible for the Written Request for Review.
2. **Site Location**, including latitude and longitude coordinates; County, Township, Range, and Section, where applicable, of all areas included in the review site; and a "street address" where applicable.
3. **A USGS 7.5' Series Topographic Map(s)** with the review site(s) identified and plotted.
4. **Draft Site Survey Report.** The site survey report is an important part of the identification phase of Section 106 review. ~~As such, that report should list all known potentially historic properties, so that affected tribes may make an independent evaluation of their significance, along with the professional archeologist's and/or historian's recommendation regarding which ones are included or eligible for inclusion in the National Register.~~ A draft site survey report should be submitted unless a Tribe has agreed upon alternative

---

<sup>6</sup> Applicants should retain receipts as evidence in the event that questions arise regarding the process that an Applicant has followed.



~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

procedures with an Applicant that do not call for a draft site survey report or modify the requirements of that report as provided for in Section III.I.

**The Draft Site Survey Report should include:**

**[See attached Form NT]**

- ☐ ~~A site and area history, including a detailed description of the land, and indicating the degree of historical and current soil disturbance;~~
- ~~A bibliographic or narrative review of any prior archeological or historical surveys conducted in the area, which should include viewsheds;~~
- ~~A detailed description, including drawings that explain construction methodologies, describing all facets of the project that will entail soil disturbance.~~
- ~~Research findings resulting from State Wide Archeological Inventory or Master Site File searches. Applicants should recognize, however, that a finding of “no known sites” in the Inventory or Master File Search is not conclusive evidence that sites are not present and does not automatically relieve the Applicant of the responsibility for conducting an archeological survey;~~
- ☐ ~~An archeological site survey conducted by a professional archeologist who meets the Secretary of the Interior’s Standards and has credentials that demonstrate regional knowledge and experience.<sup>7</sup> Unless otherwise agreed to, the archeological examination should be conducted on a five-meter or less established grid after a pedestrian reconnaissance along the transects, and shovel testing to sterile soil levels at each grid intersect across the areas being tested.~~
- ~~The results of a survey of the Area of Potential Effects (APE), defined below, that identifies and contains photographs of all historic properties within the APE;<sup>8</sup>~~
- ☐ ~~An evaluation of the undertaking’s effect on historic properties, including viewsheds;~~
- ~~Identification of any other potential environmental intrusions or impact.~~

- 5. Area of Potential Effect. If substantial evidence supports it, an A archeological examination should may be conducted in any area(s) required for construction of a tower, its access road(s) and/or equipment pads inside or outside of the primary site; any anchor sites; and all areas of heavy**

<sup>7</sup> Each USET Tribe is encouraged to provide a list of archeological firms that it believes meet these standards and that have established a positive reputation with the Tribe for professionalism and respect of tribal culture. Applicants are encouraged to use firms from this list to build trust and expedite this process. The designation of a firm(s) by a USET tribe does not imply that the Tribe believes that such firm(s) has the “special expertise” that the tribe itself possesses “in assessing the eligibility of historic properties that may possess religious and cultural significance to them” (Advisory Council Regulations, Section 800.4(c)(1)).

<sup>8</sup> Color images of the site and eligible features can be submitted in digital formats if they are of sufficient quality to allow review.

~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

equipment access. For purposes of this Agreement, the Area of Potential Effect is defined as Section \_\_\_ of the Nationwide Programmatic Agreement. ~~In addition, the Draft Site Survey report should identify an area that extends beyond the immediate site in which a survey will be conducted for eligible National Register sites where the effect may be indirect. Unless otherwise agreed upon by the Tribal Official responsible for historic preservation and the Applicant, this area will be \_\_\_ mile for towers under \_\_\_ and \_\_\_ miles for towers over \_\_\_. (Note: The intent is to make the APE comport with the Proposed Nationwide PA.)~~

6. The Best Practices does not apply to:

- a.) undertakings which are exempt from Section 106 review as set forth in Section \_\_\_ of the Nationwide Programmatic Agreement; and
- b.) collocation of communications facilities and antennas on existing structures, including buildings or tower farms.

~~6.7.~~ **Compliance with ~~other alternative~~ agreed upon conditions.** If there have been ~~other additional alternative~~ conditions agreed to during the Initial Contact, the Applicant should address such conditions.

**E. Tribal Response to the Request for Review.** The Tribe should respond to the Applicant, in writing, within 30 days of receipt of the Request for Review. The Tribal Officer may indicate:

1. **Request for Additional Information.** If the review materials package originally provided by the Applicant does not provide all of the required information, as established in Section III.D, or is otherwise insufficient for the Tribe to make an assessment regarding the presence of properties of religious and cultural significance to the tribe that are listed or eligible to be listed in the National Register or assess the effect on such properties, the Tribe may request additional information. ~~The Tribe should make the request by letter or e-mail as soon as the need for additional information is identified and in no event more than ten (10) business days after the package is received.~~ This request may be made in writing, at project meetings, or during teleconferences and should be conveyed to the Applicant at the earliest possible time. The Tribe's 30-day deadline for responding to the Applicant will ~~begin anew be suspended until, upon~~ receipt of the response from the Applicant. If after a request ~~for additional information~~ the ~~Tribe believes the~~ Applicant's response ~~is remains~~ insufficient the Tribe may, at its discretion, contact the Commission and ask that it provide, or instruct ~~its~~ the Applicant to provide the needed information. If the Applicant, after ~~providing the additional information, two efforts to satisfy the Tribe's request for additional information,~~ feels the request is unreasonable it may, at its discretion, contact the



~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

Commission and ~~request that it~~ seek appropriate relief. ~~clarification from the Tribe of information needed.~~

2. **No Interest.** If the Tribe determines that there is not a likelihood of eligible properties of religious and cultural significance to the Tribe in the area, it should advise the Applicant by letter or e-mail. This letter or e-mail will serve as evidence that the tribe has issued its response and may be appended to any submission made to the State Historic Preservation Office (SHPO) or the Commission. If a Tribe indicates it has no interest in the area under consideration, the Commission's obligations under Section 106 of the NHPA are satisfied without further discussions with the tribe. The Applicant should recognize that a finding of "No Interest" does not preclude the possibility that inadvertent finds made during the construction process may be of interest to the Tribe. See, Section VI.
3. **Request for Additional Time.** Both the Tribe and the Applicant will make good faith efforts to abide by the time frames provided in these Best Practices and expedite the review process. If unusual circumstances (e.g., insufficient information provided by Applicant, staffing constraints, unusual research requirements, or Tribal deliberation schedules) would make it difficult to provide an adequate evaluation of the Applicant's request in a particular instance, the Tribe shall have the right to may request additional time to evaluate the Applicant's request not to exceed 30 ten (10) working days. If an extension is required the Tribe should notify the Applicant by letter or e-mail, stating the reasons for the extension, as early as possible in the initial 30-day review period. Applicants are encouraged to should accommodate a reasonable requests for extension and, if unable to do so, should notify the Commission and provide the Commission with an opportunity to review the matter.
4. **No Impact Effect.** If, after reviewing the Request for Review Packet, the Tribal Official determines either that there are no properties of religious and cultural significance to the tribe that are listed or eligible to be listed on the National Register within the APE or that the proposed project will have no impaceteffect on any such properties that are present, the Tribe should, as soon as possible, in the most expeditious manner possible, notify the Applicant. The Tribe should confirm the determination in writing, via letter or e-mail. A No Impact Effect response does not preclude the possibility that inadvertent finds made during the construction process may be of interest to the Tribe. Should an inadvertent find occur, the Applicant and Tribe should follow the procedures outlined in Section VI. A letter or e-mail advising the Applicant of a No Impact Effect response will serve as evidence that the Tribe has reviewed the Request for Review Packet and provided its views on the proposed project. The confirming letter or e-mail may be appended to any submission made to the SHPO or the Commission.

~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

5. **No Adverse ~~Impact~~Effect.** If, after reviewing the Request for Review Packet, the Tribal Official identifies properties of cultural and religious significance that he or she believes are eligible for listing in the National Register within the APE, for which there would be no adverse ~~impact~~effect, he or she should notify the Applicant as soon as possible, in the most expeditious manner possible. ~~The Tribe should confirm the determination in writing, via letter or e-mail. A letter or e-mail advising the Applicant of No Adverse Impact Effect will serve as evidence that the Tribe has reviewed the Request for Review Packet and provided its views on the proposed project. The confirming~~ letter or e-mail may be appended to any submission made to the SHPO or the Commission. A No Adverse ~~Effect~~ Impact response does not preclude the possibility that inadvertent finds made during the construction process may be of interest to the Tribe. Should an inadvertent find occur, the Applicant and Tribe should follow the procedures outlined in Section VI.
6. **Adverse ~~Effect~~Impact.** If, after reviewing the Request for Review Packet, the Tribal Official identifies properties of cultural and religious significance eligible for listing in the National Register within the APE, that he or she believes would be adversely ~~impacted~~ affected by the proposed project, he or she should notify the Applicant as soon as possible, in the most expeditious manner possible. ~~writing, via letter or e-mail, stating the basis of the Tribal Officials eligibility and effects determinations. The Tribe may shall confirm the determination in writing or via e-mail.~~ The Applicant should notify the Commission of the Tribal Official's opinion and forward to the Commission a copy of ~~the letter or e-mail containing~~ the Tribal response.

**F. Addressing Adverse ~~Impacts~~Effects.** If the Applicant seeks to proceed at a site where the Tribe believes there would be an Adverse ~~Effect~~Impact, it should attempt to resolve the Tribes concerns. negotiate an MOU with the Tribe specifying actions to avoid or mitigate the Adverse EffectImpact. ~~Such n~~ negotiations should commence as soon as possible after a response of adverse ~~impact~~ effect is made by the Tribe and the Applicant has notified the Tribal Official that it seeks to develop the site. It should be the goal of the parties to reach a final plan to avoid or mitigate the Adverse ~~Impact~~ Effect within 30 days of the commencement of negotiations. ~~Such a deadline may be extended by the mutual consent of the parties.~~ Where the parties are unable to reach an MOU, the procedures set forth in Section V.B should be followed.

~~The MOU should contain an agreed-upon Resolution Plan that satisfies the Tribe's concerns regarding protection and preservation of the historic properties at issue. The Resolution Plan may include on-site monitoring by a qualified professional archeologist. It is noted that the MOU is a tool to address Tribal concerns, not the interest(s) of the general public or other parties who may have expressed preservation concerns about the site.~~

~~Construction should occur so as to avoid any adverse ~~impact~~ effect on human burials. Absent Commission and Tribal consent, no construction or other development activities~~

~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

~~should occur at a site on which human remains are known to exist or are likely to be encountered.~~

~~A MOU signed by the Tribe and Applicant will serve as evidence that the Applicant has made a good faith effort to satisfy the Tribe's concerns regarding the site, and has reached agreement with the Tribe. The MOU may be appended to any submission made to the SHPO or the Commission.~~

~~If the Resolution Plan specified in the MOU will only mitigate, and will not entirely avoid, an adverse ~~impact~~effect, the Commission remains obligated as the responsible Federal agency under the NHPA to review and proceed with a Memorandum of Agreement (MOA). The FCC will invite the affected tribes to be consulting and signing parties for any such MOA. An MOU does not supersede, or in any way alter, the Applicant's responsibilities under Section 1.1307(a)(4) of the Commission's environmental rules.~~

~~If the Applicant chooses to abandon the site in favor of an alternate site, it should ~~re-initiate the process specified herein for any alternate site that it has chosen~~discuss and identify alternative project sites that will be acceptable to the Tribe.~~

**G. Tribal Failure to Respond To Written Request for Review.** If the Tribe fails to respond within thirty (30) days to an Applicant's Written Request for Review, the Applicant should ~~contact the Tribe to inquire as to the reason(s) for the delay, and request a Tribal response.~~

~~If following affirmative follow up contact an Applicant does not receive a response to a Written Request for Review within ten (10) business days thereafter, the Applicant should advise the Commission in writing of the failure to respond and document the dates on which the Request for Review Packet was sent and means used.~~

~~Within thirty (30) days of receipt of information that a Tribe has failed to respond to an Applicant's Written Request for Review, the Commission will initiate, and the Commission and the Tribe will expeditiously complete, government-to-government consultation under Section 106. Within thirty (30) days, the Commission will advise the Applicant either that the Tribal Consultation is concluded or in progress. If the Commission does not provide such advice within thirty (30) days, the Applicant should contact the Commission. The Commission will keep the Applicant informed regarding the process for consultation with the Tribe and will include the Applicant in discussions with the Tribe, to the extent appropriate in the context of the Commission's government-to-government relationship with and trust responsibility to federally-recognized Tribes.~~ In the event that the Commission deems it necessary, after the failure of reasonable and good faith efforts to initiate consultation, to authorize the Applicant to complete its assessment of the site without Tribal input, the Commission will copy the Tribe on any such authorization.

~~In instances where the proposed site is not on Tribal lands or where a Tribe has not, pursuant to Section 101(d)(2) of the NHPA, assumed the functions of the SHPO with respect to tribal lands, the Applicant ~~should~~ may submit a copy of the Commission's~~

~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

~~authorization to the SHPO to serve as evidence of the Applicant's attempts to contact the Tribe.~~

**H. Early Identification of Tribal Concerns.** At any point during this recommended Best Practices process, should a Tribe have concerns that cannot reasonably be resolved with the Applicant, it should contact the Chief of the Commission's Consumer & Governmental Affairs Bureau in writing as early in the process as possible so that the concerns are addressed in the context of the special government-to-government relationship which the Commission shares with federally recognized tribes. Tribal concerns should be directed to the Consumer & Governmental Affairs Bureau.

#### IV. Revision of Tribal Position.

A Tribal position, based upon a Request for Review, may be relied upon by the Applicant and the Commission as evidence that the Tribe has reviewed the Request for Review Packet and provided its views on the proposed project. The Tribe ~~has the right to may~~ subsequently ~~rescind revise~~ such views in writing, for good cause. Good cause may include a discovery that the information on which the Tribe based its decisions was inaccurate, ~~that significant information that should have been known by the Applicant and presented to the Tribe was omitted,~~ or that during the construction process artifacts or human remains were discovered. The Tribe should notify the Commission and the Applicant ~~simultaneously~~ of its ~~decision to rescind revised position~~ as soon as possible after learning of an inadvertent find or its discovery of significant deficiencies in the materials supplied by the Applicant. Notification shall set forth ~~in full~~ the ~~reasons for basis of~~ the Tribe's action to ~~rescind revise~~ its position.

#### V. Non-Agreement.

**A. Eligibility of Historic Properties for Inclusion in the National Register.** If the Tribe and the Applicant fail to agree on whether a property of religious and cultural significance to the Tribe is included or eligible for inclusion in the National Register, a request may be presented to the Commission for resolution. The Commission will handle such requests in accordance with Section 800.4(c) of the ACHP's rules. As provided in Section 800.4(c)(2), the Tribe retains the right to ask the ACHP to request that the Commission submit such issues to the Keeper of the National Register.

**B. Adverse ~~Impacts~~ Effects.** If the Tribe and the Applicant fail to agree on the ~~impact effects~~ of proposed construction on a historic property of cultural and religious significance to the Tribe, or cannot agree upon a Resolution Plan, they may present their separate findings to the Commission for resolution. ~~The Commission will then commence consultation, as required by Federal law, directly with the Tribe concerning the proposed project. Once the Commission and the Tribe enter into consultation, t~~The requirements and remedies of the NHPA will apply, including the development of a Memorandum of Agreement.

## VI. Inadvertent Finds.

**A. Applicant Responsibility.** In the event of an inadvertent find of cultural features, human remains, and/or artifacts, including grave goods, the Applicant should: (1) cease construction immediately; (2) take reasonable and immediate steps to protect the site from environmental destruction, vandalism, and/or theft; (3) ensure the confidentiality of the site; (4) contact a person with relevant expertise (e.g., the original archaeological compliance firm, or a forensic anthropologist or pathologist in the case of human remains), to confirm and evaluate the find; (5) if the remains or artifacts are, or have the potential to be, Native American, notify any potentially affected Tribes immediately by telephone; (6) follow up within three days of telephone notification with written notification by first class U.S. mail or overnight courier; and (7) immediately notify the Commission.

Treatment of human remains and associated grave goods is of particular interest to Tribes. To the extent permitted by federal, state and Tribal law, Tribal wishes regarding the disposition of the human remains and associated grave goods should be honored in decisions.

When the land on which the telecommunications facility is being constructed is owned by an entity or individual other than the Applicant, the Applicant should, subject to Tribal wishes, make a good faith effort to represent Tribal interests relating to the disposition and preservation of discovered artifacts to the land owner.

**B. Tribal Responsibility.** In the event of an inadvertent discovery during the construction process, the Tribe should respond with a determination of its desires concerning the inadvertent find as quickly as practicable. In no case should a response to the Applicant occur later than seven days after written notice of an inadvertent find has been received by the Tribal Officer. The affected Tribes are encouraged to confer among themselves on the appropriate disposition of remains and/or artifacts.

**C. Compliance with the Law.** In the event of an inadvertent find, nothing in this Best Practices is intended to supercede any pertinent Federal and state laws and regulations including, but not limited to, the Native American Graves Protection and Repatriations Act, Archaeological Resources Protection Act, American Indian Religious Freedom Act, National Environmental Policy Act, and Executive Order 13007—Indian Sacred Sites to which the Applicant would be subject.

## VII. Multiple Tribal Interests.

In those cases where the proposed project is located on or near properties of significance to more than one USET member Tribe, there is a responsibility to contact each appropriate Tribe individually. The Tribes should respond individually, per Section III.

## VIII. Confidentiality.

~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

**A. Applicant Concerns.** USET and the Commission acknowledge that both the Applicant and the Tribe have substantial confidentiality concerns. When the Applicant considers site locations, project design, or other data to be confidential, and advises the Tribe that it is presenting proprietary business information, the Tribe ~~should~~ must agree to treat the material received from the Applicant as confidential, except where disclosure is authorized in writing by the Applicant or otherwise required by law.

**B. Tribal Concerns.** USET and the Commission acknowledge that Tribes consider the location of many properties of cultural and religious significance to be proprietary cultural information, and seek confidentiality in order to protect those properties. The Applicant ~~should~~ will not disclose information it has acquired, whether from the Tribe or from another source, that relates to properties of cultural and religious significance to the Tribe, except where disclosure is authorized in writing by the Tribe or otherwise required by law. The Commission and USET acknowledge that there may be some circumstances in which the Tribe cannot divulge to the Applicant the exact nature or location of a Tribal cultural or religious property. In such circumstances, the Tribe should endeavor, in good faith and to the extent consistent with its need for confidentiality and Tribal custom or law, to provide as much relevant information as possible to the Applicant.

*CTIA and its members fully understand the importance of treating the location of many properties of cultural and religious significance to Tribes and acknowledge the proprietary nature of such cultural information. Several of CTIA members, however, recently contacted CTIA and raised concerns regarding the unintended consequences of strict implementation of this provision in the field. They noted that Applicants need the ability to provide data on a site to sub-tenants and other collocated entities on the Applicant's tower. Such data includes the status of Section 106 review, including whether the Applicant has made reasonable and good faith efforts with respect to tribal notification and participation in the Section 106 process. As a practical matter, site data including Best Practices processes will be routinely provided to sub-tenants and collocated entities. Under the current provisions, an Applicant would be required to seek permission from the Tribe each time an Applicant provided information to sub-tenant or collocated entity.*

*While the proposed language below is one suggested approach for addressing both the Tribes and Applicants' concerns, CTIA would like to explore other suggested approaches with USET, NCAI and the FCC.*

**C.** Notwithstanding Section VIII.B. of this Agreement, the Applicant may disclose such Confidential Information only to those employees, contractors, representatives and agents, including subtenants and entities collocated on the Applicant's tower (Receiving Party), who have a need to know such Confidential Information for compliance with laws and regulations governing the preservation of historic properties. The Applicant and the Receiving Party shall hold such Confidential Information in strict confidence, and use at least the same degree of care as it uses to safeguard its own most confidential and proprietary information so as to insure that no unauthorized person has access to it.



~~March 5 April 1 April 9, 2004~~

DRAFT—DRAFT—DRAFT

The Applicant shall ensure that the Receiving Party is aware and abides by the Tribal restrictions regarding the use of such Confidential Information.

**IX. Compensation for Professional Services. [This provision is inconsistent with PCIA's understanding of the law.]**

The Advisory Council regulations state that the “agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.” (§ 800.4(c)(1)). Consistent with the ACHP Memorandum on *Fees in the Section 106 Review Process*, payment to a Tribe is appropriate when an Agency or Applicant “essentially asks the tribe to fulfill the role of a consultant or contractor” when it “seeks to identify historic properties that may be significant to an Indian tribe, [and] ask for specific information and documentation regarding the location, nature and condition of individual sites, or actually request that a survey be conducted by the tribe.”<sup>9</sup> In providing their “special expertise,” tribes are fulfilling a consultant role. The amount of compensation, if any, should be negotiated between the Applicant and the Tribe. USET has adopted a ~~recommended compensation model cost recovery~~ schedule for such consultant or contractor services, which it states is intended solely to cover tribal costs, and which is appended hereto as Appendix B. Use of the model cost recovery schedule is strictly voluntary.

**X. Government-to-Government Consultation between a Tribe and the FCC.** Consistent with ACHP guidance, when an agency seeks the governmental views of an Indian tribe regarding an agency undertaking to fulfill the agency’s legal obligation to consult, the agency is not required to pay the tribe for providing its views. If the agency has made a reasonable and good faith effort to consult with an Indian tribe and the tribe refuses to respond without receiving payment, the agency has met its obligation to consult, and is free to proceed with the project review and approval process.<sup>10</sup>

**XI. Dispute Resolution.**

In instances where the Tribe and the Applicant are unable to reach any agreement, the dispute should revert to the Commission as the Federal agency responsible for complying with Section 106 of the NHPA. ~~When the parties cannot agree, the Commission will complete Tribal consultation, pursuant to its government-to-government responsibilities.~~ As the responsible agency, the Commission will then render a substantive decision in writing resolving the matter.

**XII. Amendments and Future Meetings**

<sup>9</sup> See John Fowler, *Fees in the Section 106 Review Process*, Executive Director Memorandum, Advisory Council on Historic Preservation at 3 (July 6, 2001).

<sup>10</sup> See *id.* At 2-3.

~~March 5~~April 1~~April 9~~, 2004

DRAFT—DRAFT—DRAFT

These Best Practices may only be amended by agreement in writing by the Commission and USET. The Commission and USET agree that, six (6) months after these Best Practices are adopted, the Commission will hold a meeting with USET and communications tower industry officials to review and evaluate the effectiveness of the provisions of these Best Practices and discuss the need for any amendments. Thereafter, the Commission and USET agree to meet at one-year intervals to discuss the continued effectiveness of these Best Practices and the need for any further amendments.